

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STEPHEN LIEBB,  
Petitioner,  
v.  
ROBERT WONG, Acting Warden,  
Respondent.

No. C 08-02643 CW  
ORDER DENYING  
RESPONDENT'S MOTION  
FOR STAY

Respondent Robert Wong<sup>1</sup> requests an expedited ruling on his motion for a stay of the Court's December 2, 2009 Order granting Petitioner Stephen Liebb's petition for a writ of habeas corpus.<sup>2</sup> Petitioner opposes the motion. The matter was taken under submission. Having considered all the papers filed by the parties, the Court denies the motion.

BACKGROUND

On May 27, 2008, Petitioner filed his petition for writ of

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<sup>1</sup>In accordance with Rule 2(a) of the Rules Governing § 2254 Proceedings and Rule 25(d)(1) of the Federal Rules of Civil Procedure, the Court substitutes Robert Wong as Respondent because he is now Petitioner's custodian.

<sup>2</sup>Respondent has failed to cite authority for his request for an expedited ruling by December 30, 2009, within three Court days from the date of the filing of his motion. The Court notes that Respondent filed his reply on January 4, 2010, after the date he requested for the Court's ruling.

1 habeas corpus directed to a 2007 denial of parole by the Board of  
2 Parole Hearings (Board). On December 2, 2009, the Court granted  
3 the petition and remanded this case to the Board to hold a new  
4 parole hearing by January 31, 2010, sixty days from the date of the  
5 Order, to reevaluate Petitioner's suitability for parole in  
6 accordance with the Court's order. In its Order, the Court  
7 indicated that, if the Board found Petitioner suitable for parole  
8 and set a release date for Petitioner and, if the Governor did not  
9 reverse, the Court would stay Petitioner's actual release for two  
10 weeks to allow Respondent to request a stay pending appeal from  
11 this Court and, if necessary, from the Court of Appeal.  
12 Respondent requests a stay of the order requiring a new hearing by  
13 January 31, 2010, and, for this reason, requests an expedited  
14 ruling on its motion.

15 LEGAL STANDARD

16 Rule 62(c) of the Federal Rules of Civil Procedure provides,  
17 "When an appeal is taken from an interlocutory or final judgment  
18 granting, dissolving, or denying an injunction, the court in its  
19 discretion may suspend, modify, restore, or grant an injunction  
20 during the pendency of the appeal." The standard for granting a  
21 stay pending appeal is similar to that for a preliminary  
22 injunction. Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983).  
23 Thus, a party seeking a stay must show either (1) a likelihood of  
24 success on the merits of its appeal and the possibility of  
25 irreparable harm, or (2) that serious questions regarding the  
26 merits exist and the balance of hardships tips sharply in its  
27 favor. Id. The relative hardship to the parties is the critical  
28 element in determining whether a stay is justified. Id. In cases

1 such as this one, where the public is affected, the court should  
2 also consider the effect on the public interest of granting the  
3 stay. Id. at 1435-36.

4 DISCUSSION

5 Respondent argues that a stay should be granted because he has  
6 a high likelihood of success on the merits based on the Court's  
7 failure appropriately to apply the deferential standard of federal  
8 habeas review and its erroneous application of the "some evidence"  
9 test. Further, Respondent argues that these issues are before the  
10 en banc panel in Hayward v. Marshall, 527 F.3d 797 (9th Cir. 2008),  
11 and that resolution of them could significantly impact this case.  
12 Respondent also argues that the Board will be irreparably injured  
13 if it has to hold a hearing in accordance with the Court's December  
14 2, 2010 Order because that Order improperly usurps the Board's  
15 legislatively mandated duty to assess Petitioner's suitability for  
16 parole in the interests of public safety. Respondent contends that  
17 the public has an interest in the Board's decision remaining  
18 undisturbed during the pendency of the appeal of this Court's  
19 decision.

20 Respondent has not demonstrated a strong likelihood of success  
21 on the merits of his appeal. Respondent merely repeats arguments  
22 he made in his answer to the petition for writ of habeas corpus,  
23 which the Court considered and rejected. See December 2, 2009  
24 Order at 11-12 (addressing Respondent's arguments that California  
25 inmates do not have a federally protected liberty interest in  
26 parole release and, in the alternative, that due process only  
27 entitles an inmate to present his case to the Board and to receive  
28 an explanation of why the Board denied parole). In regard to

1 Respondent's argument about the some evidence standard of review,  
2 the Court applied Supreme Court and Ninth Circuit authority and  
3 California statutes and regulations. See December 2, 2009 Order at  
4 12-15. Although the en banc panel's resolution of Hayward may  
5 decide whether California inmates have a federally protected  
6 liberty interest in parole release and whether the some evidence  
7 standard applies to review of state parole decisions, this  
8 possibility does not demonstrate a strong likelihood of success on  
9 the merits of this appeal. It is unknown when a ruling in Hayward  
10 will be made, what it will decide and how this would affect the  
11 December 2, 2009 Order.

12 Likewise, Respondent's argument that the Board will be  
13 irreparably injured because the Court has "usurped" its power by  
14 requiring it to hold a hearing in accordance with the December 2,  
15 2009 Order is not persuasive. Respondent had argued that the only  
16 remedy the Court could employ was to order another hearing in  
17 compliance with due process.

18 Furthermore, any injury suffered by Respondent or the Board  
19 will not be irreparable. As indicated in the December 2, 2009  
20 Order, if the Board finds Petitioner suitable for parole and the  
21 governor upholds that finding, the Court will stay Petitioner's  
22 actual release for two weeks to allow Respondent to request a stay  
23 pending appeal from this Court and, if necessary, from the Court of  
24 Appeal. Therefore, the Board's authority and the safety of the  
25 public will not be affected if the January 31, 2010 hearing  
26 proceeds.

27 On the other hand, Petitioner will suffer irreparable injury  
28 if the Court's order is stayed and the January 31, 2010 hearing is

1 not held. The Court has found that Petitioner is entitled to a new  
2 hearing, which could result in his release. If this hearing is  
3 delayed indefinitely, Petitioner will suffer further confinement  
4 while awaiting re-scheduling of the hearing once his entitlement to  
5 it is affirmed.

6 Respondent's additional argument, presented in his reply, that  
7 the state will be irreparably injured by spending money that cannot  
8 be reclaimed after the Court-ordered hearing is held is  
9 unpersuasive when compared to the constitutional injury suffered by  
10 Petitioner.

11 Because Petitioner will suffer irreparable injury if the  
12 December 2, 2009 Order is stayed and Respondent will suffer little  
13 or no injury, and because Respondent's likelihood of success on the  
14 merits is uncertain, the Court denies Respondent's motion for a  
15 stay pending appeal.

16 CONCLUSION

17 For the foregoing reasons, Respondent's motion for a stay  
18 pending appeal is denied.

19  
20 IT IS SO ORDERED.

21  
22 Dated: January 12, 2010



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CLAUDIA WILKEN  
United States District Judge